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In the 1961

Supreme Court of the United States

COMMANDER RALPH PORGES,
Petitioner,

vs.

GEORGE C. SCHIELE, Tax Commissioner.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this case.

OPINIONS BELOW

There was no opinion written by either the Supreme Court of Ohio or the Court of Appeals for the First Appellate District. The opinion of the Court of Common Pleas, Hamilton County, Ohio, has not as yet been published. (Appendix A page 7.)

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on March 8, 1961, (Appendix E, infra, page 20). The jurisdiction of this Court is evolved under 28 USC 1254 (1).

QUESTION PRESENTED

The simple question of law presented to the Court is whether or not the provisions of the Universal Military Training Act make applicable the provisions of the Soldiers and Sailors Civil Relief Act to the Commissioned Officers Corps of the Public Health Service. This action is one by a commissioned officer of the Public Health Service in which he requests an injunction against the Tax Commissioner of the City of Cincinnati, Ohio, to enjoin the collection of income tax based on his earnings as a commissioned officer of the Public Health Service.

STATUTES INVOLVED

Title 50 U. S. Code Ann., War, App., Sec. 464 and Title 50 U. S. Code Ann., War, App., Sec. 574. These sections are set forth in Appendices B and C, infra, pages 16, 17, 18.

STATEMENT

The plaintiff is a commissioned officer in the Public Health Service with the rank of Commander at the time of the filing of this action. His present rank is Captain. His home and voting residence is 62 Richardson Street, New Brunswick, New Jersey. He temporarily resides within the city limits of the City of Cincinnati, Hamilton County, Ohio, and is assigned for duty at the Robt. A. Taft Sanitary Engineering Center, also in Cincinnati, Ohio.

By way of background for the information of the Court, the Commissioned Officer Corps of the Public Health Service consists of a professional staff of physicians, dentists, engineers and scientists. The responsibility of this Corps, from the standpoint of national defense, can be reduced to the term ABC's of modern warfare. That is to say Atomic, Biological and Chemical. This corps of officers

has the same pay as officers of the other services, dependent medical care is the same, retirement the same, insurance the same and so forth. The Public Health Service does not draft personnel, but physicians and dentists may serve their time, as required by the Universal Military Training Act, with the Public Health Service, the Army, the Navy or the Air Force. The plaintiff filed his application for a commission with the Public Health Service and it was granted on June 3, 1940. He has been an officer of said service since that date.

The defendant is the Tax Commissioner of the City of Cincinnati and did on April 24, 1958, acting under authority of the City of Cincinnati Income Tax ordinances, assess an income tax levy against the plaintiff based on the income earned as a commissioned officer of the Public Health Service.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Ohio, by virtue of not granting a writ of certiorari has decided a Federal question of substance, namely the application of the above two sections of the United States Code not theretofore determined by this Court. This decision while technically applicable only to commissioned officers of the Public Health Service located in Ohio will in all probability have application in the fifty (50) states of the Union.

The opinion of the trial court and the briefs of the Tax Commissioner raise two (2) points.

1. Has the Congress of the United States the constitutional power to exempt from state or municipal taxation individuals carrying out the function of the United States Government; or as the trial court stated in opinion:

> "The exact question here presented, so far as the Court has been able to find, has never been squarely

passed upon by a court of last resort, and may be stated thus: Has the Congress of the United States power to exempt from state taxation persons in the employ of the United States Government, other than those engaged in the Armed Forces?"

2. Assuming the constitutionality of the exercise of this power, must the individual be "inducted" into the Public Health Service for the exemption to apply?

In response to the first point we submit that this Court has disposed of the question completely and answered it affirmatively in the case of *Dameron* v. *Brodhead,* 345 US 322, 73 S. Ct. 721, using the following language:

> "The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service, cannot be doubted. Generally similar relief has often been accorded other types of federal operations or functions. And we (325) have upheld the validity of such enactments, even when they reach beyond the activities of federal agencies and corporations to private parties who have seen fit to contract to carry on functions of the Federal Government. Carson v. Roane-Anderson Co., 342 U. S. 232, 72 S. Ct. 257, 96 L. Ed. 257."

Responding to the second point we submit that neither the trial court nor the Tax Commissioner understands the application of the Universal Military Training Act because there are no provisions for inducting personnel into the Public Health Service in the entire Act.

Perhaps the best way to understand the application of the section as it regards induction is to analyze it historically. This section is the same now as it was prior to 1950 with one exception. Title 50, War, Appendix, Sec. 464 formerly read:

> ". . . all of the provisions of the Soldiers' & Sailors' Civil Relief Act of 1940, . . . shall be applicable to all persons in the armed forces of the United States, including all persons inducted into the armed forces pursuant to this title, the Coast Guard, or the Public Health Service, until . . . . etc."

Until September, 1950, the Coast Guard had no difficulty in maintaining its enlistment quota through voluntary enlistments without regard or need for the draft.

On June 25, 1950, the Korean war commenced and the mission of the Coast Guard was enlarged. A need for the draft was present. This situation is explained in U. S. Code & Congressional Service, 1950, Vol. 2, at page 3953. Under the heading "Explanation of the Bill" is found the following:

> "First. It would amend the Selective Service Act of 1940 so as to authorize the induction of personnel for Coast Guard service."

At this time refer to Title 50, War, Appendix, Sec. 466 for a definition of the term "Armed Forces." The Coast Guard is not named before September 27, 1950, but after this date the service becomes an "armed force."

In other words a need now arose for the induction of personnel through the means of the Selective Service Act (now called the Universal Military Training Act). And on September 27, 1950, the Coast Guard was eliminated from a status the same as the Public Health Service and became a member of the armed forces. See Sec. 466.

The intent of Congress was obviously to extend the benefits of the Soldiers' & Sailors' Civil Relief Act, prior to September, 1950, under Section 464, to both the Coast Guard and the Public Health Service. This without regard for the application of the term "induction" since neither

organization inducted any personnel under the Act. At the present time the obvious intent of Congress is to include the Public Health Service within the provisions of the Relief Act without regard to induction since there are no provisions in the Act for induction.

CONCLUSION

Summing up, we state that the simple reason for the inclusion of the Commissioned Officers of the Public Health Service within the provisions of the Soldiers' and Sailors' Civil Relief Act is because the statute says so. This is evident from the words of the Statute and from the history of the Statute as it relates to an analogous service, namely the Coast Guard.

For these reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEPHEN M. D. BURNS
211 East Fourth Street
Cincinnati 2, Ohio
Attorney for Petitioner

APPENDIX A

(CAPTION OMITTED)

OPINION OF COURT OF COMMON PLEAS, HAMILTON COUNTY, STATE OF OHIO,

Case No. A-164981

(Entered September 9, 1959.)

BELL, J.

In this case (Commander Ralph Porges vs. George C. Schiele, Tax Commissioner of the City of Cincinnati), the plaintiff seeks a permanent injunction to prevent the defendant from collecting a one per cent payroll tax authorized by virtue of an ordinance of the City of Cincinnati.

The petition alleges that the defendant did assess against the plaintiff the amount of $216.71 earned by the plaintiff as income for services rendered as an employee of the Federal Public Health Service. Plaintiff further alleges that the defendant is forbidden by law to assess a levy against him, but that unless enjoined by the court, the defendant will certify the levy to the City Solicitor for enforcement and collection.

The defendant did not demur to the petition, but filed an answer in which he denies that he is forbidden by law to assess this tax against the plaintiff.

The case was heard upon the petition, the answer and the evidence and is now before the court for consideration.

There is little or no dispute in the evidence. The evidence offered by the plaintiff discloses that the plaintiff, early in the year 1940, made application for a commission in the Federal Public Health Service, and that he received

such a commission in June of that year. At the time of receiving his commission the Federal Public Health Service was under the supervision of the Treasury Department of the United States. After receiving his commission he was assigned to a number of different locations. Since 1955 he has been assigned to the Robert A. Taft Sanitary Engineering Center located in Cincinnati, Ohio. His present rank is Senior Sanitary Engineer, or Commander The tax was levied for all, or part of the time he has been assigned to the Taft Center.

During his service the Federal Public Health Service was transferred to the Department of Health, Education and Welfare under the Secretary of that Department.

The only other witness was the defendant. He testified that he reviewed the application of the plaintiff for exemption; ruled that he was not entitled to the exemption, and that ruling was sustained by the Board of Tax Commissioners, and thereupon the tax due the City of Cincinnati was assessed.

The claims for exemption from the payments of taxation have been the subject of much litigation, and innumerable decisions have been rendered in cases presenting varied factual situations.

The exact question here presented, so far as the Court has been able to find, has never been squarely passed upon by a court of last resort, and may be stated thus: Has the Congress of the United States power to exempt from state taxation persons in the employ of the United States Government, other than those engaged in the Armed Forces?

That Congress has the power to exempt from taxation persons in the Armed Forces, during the period of their service, admits of no doubt; but whether Congress has the power to exempt persons employed by federal agencies is a matter of very great doubt.

In *Cooley on Taxation*, Volume II, Section 607, it is stated:

> "Under this important limitation: agencies of the federal government are exempt from state taxation only so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the government. This has been stated over and over again. The state may tax the property of federal agencies with other property in the state and as other property is taxed when no law of Congress forbids and when the effect of the taxation will not be to defeat or hinder the operation of the national government. * * * The test is whether the tax deprives the persons or corporations taxed in truth of power to serve the government as they were intended to serve it or hinder the efficient exercise of their power. * * * A tax upon property of agents or agencies of the federal government does not necessarily deprive them of their power to serve such government nor hinder the efficient exercise of the power and hence may be rightfully laid."

The nearest approach to the question here under consideration, which the court has been able to find, is the case of *Graves* v. *New York ex rel O'Keefe*, 306 U. S., 466. In that case the question presented was whether an attorney for the Federal Housing Commission was exempt from paying an income tax levied by the State of New York. In an elaborate opinion written by Mr. Justice Stone, it was decided that the employee was subject to the tax. In the course of that opinion Mr. Justice Stone used this language:

> "Whether Congress may, by express legislation relieve its functionaries from their civic obligations to pay for the benefit of the state government under which they live, is a matter for another day.

"Whether its power to grant tax exemptions is an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies, which courts have implied, is a question which need not now be determined. * * *

"The only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions. * * * The immunity is not one to be implied from the Constitution, because, if allowed, it would impose to an inadmissible extent a restriction on the taxing power, which the Constitution has reserved to the state governments."

In the O'Keefe case the claim was made that the Constitution implied that he was exempt from the payment of the tax. In the instant case the plaintiff contends that he is exempt by virtue of the provisions of a statute, Section 464, of Title 50 U. S. Code, Ann., which reads as follows:

"Notwithstanding the provisions of section 604 of the Act of October 17, 1940 (54 Stat. 1191) (Section 584 of this Appendix), and the provisions of section 4 of the Act of July 25, 1947, (Public Law 239, Eightieth Congress) (section 584 of this Appendix), all of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (sections 510-590 of this Appendix), including specifically article IV thereof (sections 540-548 of this Appendix), shall be applicable to all persons in the armed forces of the United States, including all persons inducted into the armed forces pursuant to this title (sections 451-454 and 455-471 of this Appendix), or the Public Health Service, until such time as the Soldiers' and Sailors' Civil

> Relief Act of 1940, as amended (sections 510-590 of this Appendix), is repealed or otherwise terminated by the subsequent Act of Congress: PROVIDED, That, with respect to persons inducted into the armed forces while this title (sections 451-454 and 455-471 of this Appendix) is in effect, wherever under any section or provision of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (sections 510-590 of this Appendix), a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed while such Act (sections 510-590 of this Appendix) is in force, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting, or other transaction. June 24, 1948 c. 625, Title I, section 14, 62 Stat. 623, amended Sept. 27, 1950, c. 1059, Section 1 (11) 64 Stat. 1074."

In the case of James v. Dravo Contracting Co., 302 U. S., 134, Chief Justice Hughes uses this language:

> "The application of the principle that governmental instrumentalities of the United States are immune from taxation by the state and vice versa, requires close distinctions, in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

It was long ago decided by the United States Supreme Court in Railroad v. Peniston, 18 Wall, 5, that the exemption of agencies of the federal government from taxation by the states is dependent not upon the nature of the agents, nor upon the mode of their Constitution, nor upon the fact that they are agents, but upon the effect of the

tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may rightfully be laid by the states.

The statute provides for postponement of payment during their period of service, of persons who are *inducted into the armed services* or the public health service. The plaintiff was never detailed into the armed service during the time here in question. He applied for a commission in the public health service voluntarily.

Assuming the power of the Congress to make this law applicable to persons inducted into the public health service, it seems to the court that it does not apply to one who voluntarily entered that service and was never detailed by proper authority for duty either with the Army or the Navy.

In my opinion, to bring a person in the Public Health Service within the provisions of Section 464, he must be assigned by proper authority, to service in the Army or Navy.

No section of the Federal Code has been called to the Court's attention which exempts persons in the Military services from paying taxes. The time of payment is deferred during such service. In the instant case, if plaintiff's contention be correct, he would escape payment of the tax although he has never been assigned by proper authority to service with the Military forces.

Section 511 reads as follows:

> "(1) The term 'persons in military service' and the term 'persons in the military service of the United States', as used in this Act (sections 501-548 and 560-

590 of this Appendix), shall include the following persons and no others: 'All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy.' The term 'military service', as used in this Act (said sections), shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

"(2) The term 'period of military service' as used in this Act (said sections), shall include the time between the following dates: For persons in active service at the date of the approval of this Act (Oct. 17, 1940), it shall begin with the date of approval of this Act (Oct. 17, 1940); for persons entering active service after the date of this Act (Oct. 17, 1940), with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act (said sections) ceases to be in force.

"(3) The term 'person' when used in this Act (said sections) with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association

"(4) The term 'court' as used in this Act (said sections), shall include any court of competent jurisdiction of the United States of any state, whether or not a court of record. Oct. 17, 1940, c. 888, Sec. 101, 54 Stat. 1179."

Sections 573 and 574 of Title 50 read as follows:

"Sec. 573. The collection from any person in the military service of any tax on the income of such person, whether falling due prior to or during his period of military service, shall be deferred for a period extending not more than six months after the termination of his period of military service if such person's ability to pay such tax is materially impaired by reason of such service. No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such amount during such period, shall accrue for such period of deferment by reason of such nonpayment. The running of any statute of limitations against the collection of such tax by distraint or otherwise shall be suspended for the period of military service of any individual the collection of whose tax is deferred under this section, and for an additional period of nine months beginning with the day following the period of military service. The provisions of this section shall not apply to the income tax on employees imposed by section 1400 of the Federal Insurance Contributions Act (section 1400 Title 26). Oct. 17, 1940, c. 888, Sec. 513, 54 Stat. 1190."

Section 574:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any state, territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any state, territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other state, territory, possession, or political subdivision of any of the foregoing, or the District

of Columbia, while, and solely by reason of being, so absent. *For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any state, territory, possession, or political subdivision of any of the foregoing, or the District of Columbia,* of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for service performed within, or from sources within, such state, territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such state, territory, possession, or political subdivision, or district. PROVIDED, That nothing contained in this section shall prevent taxation of any state, territory, possession, or political subdivision, of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section (a), the term 'personal property' shall include tangible and intangible property (including motor vehicles) and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: PROVIDED, That the license, fee, or excise required by the state, territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, Sec. 514, as added Oct. 6, 1942, c. 581, Sec. 17, 56 Stat. 777, as amended July 3, 1944, c. 397, Sec. 1, 58 Stat. 722." Emphasis added.

When these sections, all being a part of Title 50, U. S. Code Ann., are read in pari materia with Section 464 (relied on by plaintiff), it seems clear that Section 464 has

no application to the status of the plaintiff during the period here in question.

In my opinion, any person connected with the Public Health Service must be assigned by proper authority to duty in the military service to be entitled to the benefit of Section 464.

The expressed intention of Congress was to postpone the time of payment of income taxes for persons during their periods of military service and six months thereafter. Having concluded that Section 464 of Title 50 U. S. Code Ann. does not apply to plaintiff, the decision in the O'Keefe case is dispositive of this controversy.

Hence, the plaintiff is not entitled to exemption or postponement, and his petition should be and hereby is dismissed.

Appearances—

Stephen M. D. Burns, Counsel for Plaintiff.

James W. Farrell, Jr., City Solicitor. Phil S. Olinger, Assistant City Solicitor, Counsel for Defendant.

September 9, 1959.

APPENDIX B

Title 50, U. S. Code Ann., War, App., Section 574:

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any state, territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any state, territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have

acquired a residence or domicile in, or to have become resident in or a resident of, any other state, territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any state, territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for service performed within, or from sources within, such state, territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such state, territory, possession, or political subdivision, or district. PROVIDED, That nothing contained in this section shall prevent taxation of any state, territory, possession, or political subdivision, of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section (a), the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: PROVIDED, That the license, fee, or excise required by the state, territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, Sec. 514, as added Oct. 6, 1942, c. 581, Sec. 17, 56 Stat. 777, and amended July 3, 1944, c. 397, Sec. 1, 58 Stat. 722.

APPENDIX C

Title 50 U. S. Code, Ann., War, App., Section 464:

Notwithstanding the provisions of section 604 of the Act of October 17, 1940 (54 Stat. 1191) (section 584 of this Appendix), and the provisions of section 4 of the Act of July 25, 1947, (Public Law 239, Eightieth Congress) (section 584 of this Appendix), all of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (sections 510-590 of this Appendix), including specifically article IV thereof (sections 540-548 of this Appendix), shall be applicable to all persons in the armed forces of the United States, including all persons inducted into the armed forces pursuant to this title (sections 451-454 and 455-471 of this Appendix), or the Public Health Service, until such time as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (sections 510-590 of this Appendix), is repealed or otherwise terminated by the subsequent Act of Congress: PROVIDED, That, with respect to persons inducted into the armed forces while this title (sections 451-454 and 455-471 of this Appendix) is in effect, wherever under any section or provision of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (sections 510-590 of this Appendix), a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed while such Act (sections 510-590 of this Appendix) is in force, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting, or other transaction. June 24, 1948 c. 625, Title I, section 14, 62 Stat. 623, amended Sept. 27, 1950, c. 1059, Section 1 (11) 64 Stat. 1074.

APPENDIX D

COURT OF APPEALS
First Appellate District of Ohio
Hamilton County

(CAPTION OMITTED)

JUDGMENT OF DISMISSAL
(Entered December 7, 1960.)

This cause came on to be heard upon the appeal on questions of law and fact, a transcript of the evidence given in the lower court which was agreed by both parties to be the stipulated facts on appeal, the original papers and the pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court finds that plaintiff-appellant is not entitled to injunctive relief.

IT IS, THEREFORE, CONSIDERED by the Court that the petition of the plaintiff-appellant be and the same is hereby dismissed.

And the Court being of the opinion that there was reasonable grounds for this appeal allows no penalty.

IT IS FURTHER ORDERED that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment.

To all of which appellant by his counsel excepts.

APPENDIX E

IN THE SUPREME COURT OF OHIO

(CAPTION OMITTED)

ORDER OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF HAMILTON COUNTY TO CERTIFY ITS RECORD

(Entered Wednesday, March 8, 1961.)

It is ordered by the Court that this motion be, and the same hereby is, overruled.

(DULY CERTIFIED)